



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

JUDICIAL REVIEW MISCELLANOUS CAUSE NO. 43 OF 2018

IN THE MATTER OF THE ADVOCATES ACT, CAP 16 OF THE LAWS OF KENYA

AND

IN THE MATTER OF THE ADVOCATES REMUNERATION ORDER

AND

IN THE MATTER OF A REFERENCE FROM THE DECISION OF

THE TAXING OFFICER DELIVERED ON 24TH MAY 2018

BETWEEN

JUBILEE PARTY.....APPLICANT

VERSUS

ALFRED NDEMO ONGERA.....1ST RESPONDENT

IBRAHIM ATUTI NDEMO.....2ND RESPONDENT

MARY KEMUNTO RATEMO.....3RD RESPONDENT

KENNEDY NYANIEYA NYAMWEYA.....4TH RESPONDENT

ALFRED AKUNGA NYANGWESO.....5TH RESPONDENT

RULING

Background

1. The Respondents herein filed a claim against the Applicant before the Political Parties Disputes Tribunal (hereinafter PPDT) in PPDT Case No. 254 of 2017 on 13th May 2017, on which a ruling was delivered on 25th July 2017. Three Interested Parties who had participated in the said proceedings appealed the said ruling in Election Petition Appeal No. 77 of 2017, which was disposed of by a consent. One of the terms of the consent was that the Applicant and the Interested Parties would meet the costs of PPDT Case No. 254 of 2017.

2. The Respondents then filed their Party and Party Bill of Costs on 17th November 2017, which was heard and a ruling delivered thereon on 24th May 2018 by the Deputy Registrar, who was the Taxing Officer. The Deputy Registrar taxed the Bill of Costs as Kshs 713,340.30/=. On 22nd June 2018 the Applicant filed the instant miscellaneous suit by way of a Chamber Summons dated 20th June 2018, seeking the following orders:

- a. That the decision of the Taxing Officer (Hon. Aganyo DR) contained in the ruling dated 24th May 2018 taxing the Bill of Costs dated 17th November 2017 filed by the Respondents herein at Kshs 713,340.30/= be varied and/or set aside.

b. That this Court do order that the Party & Party Bill of Costs dated 17th November 2017 be palced before another Taxing Officer for fresh taxation

c. That the costs of the application be provided for.

3. On 27th July 2018, the Applicant filed yet another application by way of a Notice of Motion dated 24th July 2018, seeking orders of stay of execution of the ruling of Hon. Aganyo DR dated 24th May 2018, pending the hearing and determination of the suit herein.

4. The Applicant responded to the said applications in Grounds of Opposition dated 13th July 2018 and a replying affidavit sworn on the same date by their counsel on record, Dr. John Khaminwa. The two applications were heard together on 16th July 2018 by consent of both parties, and learned counsel Dr. John Khaminwa SC and Ms. Valentine Khaminwa made oral submissions for the Respondents, while learned counsel Ms. Oloo submitted for the Applicant.

The Applicant's Case

5. The Applicant's case from the pleadings it filed in court and submissions made by its counsel, is that the Taxing Officer did not consider the Applicant's submissions, and particularly the submissions that the case before the PPDT was an application seeking enforcement of orders given in another case; that no difficult or novel questions were raised in the case; that the advocates only attended court a total of three times; and that the affidavits filed in response to the application therein were not bulky and did not contain any complex information.

6. Furthermore, that the Taxing Officer's assessment of the instruction fees was too high, and that she awarded costs on items in the said Bill of Costs in relation to attendances as the registry, effecting service upon the parties and attending court which were not incurred; and thus failed to consider the principle that a successful litigant ought to be fairly reimbursed only for costs incurred.

7. The Applicant also annexed copies of a letter to the Respondents' Advocate dated 12th July 2018 seeking to settle the matter out of Court, and a letter from the Respondents' Advocate dated 18th July 2018 seeking release of the taxed costs of Kshs 713,340.30/= within 5 days or face execution proceedings. The Applicant is thus apprehensive that if orders of stay are not granted, the Respondents will make good the threat to execute, and averred that it was ready and willing to deposit the costs awarded in court or in a joint interest earning account in the names of the parties' advocates, pending the hearing and determination of the suit herein.

The Respondents' Case

8. The Respondents on their part oppose the applications on the ground that the Taxing Officer acted within the law, and assessed the Bill of Costs in the right manner. Further, that the Advocates Remuneration Order only prescribes minimum instruction fees, and under Paragraph 13 A thereof, a taxing master has power to grant any orders as are necessary for the determination of any matter. That in exercising her discretion in this regard, the Taxing Officer factored the decision in **Republic vs Minister for Agriculture and 2 Others ex parte Samuel Muchiri Njuguna and 6 Others (2006) e KLR**, and gave detailed reasons for the quantum awarded and the factors she took into account in her ruling.

9. Therefore, that the Applicant has not demonstrated any error of principle on the part of the Taxing Officer. Various judicial decision were cited by the Respondents for the position that a judge will not normally interfere with a taxing officer's decision, unless it is shown that either the decision was based on an error of principle or the amount awarded was manifestly excessive, including the decision in **Petro EA vs Uganda Sugar Factory (1970) EA 141**.

10. Dr. Khaminwa SC averred that the proceedings before the PPDT were very involving and complex, and also involved five Respondents and a senior counsel. Further, that the Respondents filed a Bill of Costs of over Kshs 7 million which was taxed off to about Kshs 700,000/= . He also averred that the Court and Registry attendances in their Bill of Costs accurately reflected the times they attended the said forums, as the backlog of political cases required an unusual amount of attention and presence.

11. Lastly, the Respondents contended that the Applicant cannot allege that the taxed costs were excessive, yet they were willing to pay Kshs 500,000/= in settlement of the same, and that a stay of execution and deposit of the taxed costs would only be possible if there is merit in the Applicant's application, of which there is none.

The Determination

12. The applications herein raise two issues. The first is whether the ruling of the taxing master dated 24th May 2018 is amenable to being set aside or varied on account of errors in the taxation of the contested items on professional fees, o attendances at the registry, effecting service upon the parties and attending court in the Respondents' Party and Party Bill of Costs dated 17th November 2017. The second issue is whether the conditions for a stay of execution of the taxed costs have been established.

12. The applicable principles as regards setting aside or varying a taxation of a bill of costs are that a Court cannot interfere with the taxing officer's decision on taxation, unless it is shown that the decision was based on error of principle, or the fee awarded was manifestly excessive as to justify interference. These legal parameters were laid down in **First American Bank of Kenya Vs Shah and Others [2002] E.A.L.R 64** at 69 by Ringera J. (as he then was) who delivered himself thus;

“First, I find that on the authorities, this court cannot interfere with the taxing officer's decision on taxation unless it is shown that either the decision was based on an error of principle, or the fee awarded was so manifestly excessive as to justify an inference that it was based on an error of principle”.

13. These principles reiterate the position of the Court of Appeal in **Joreth Ltd vs Kigano & Associates (2002) 1 EA 92**, where the said Court held that a taxing master in assessing costs to be paid to an advocate in a bill of costs was exercising her judicial discretion and that such judicial discretion can only be interfered with when it is established that the discretion was exercised capriciously and in abuse of proper application of the correct principles of law, or where the amount of fees awarded by the taxing master is excessive to amount to an error in principle.

14. Specifically as regards the taxing of instruction fees, the following guidelines were provided by Ojwang J. (as he then was) in **Republic vs. Ministry of Agriculture & 2 Others Ex parte Muchiri W’Njuguna & 6 Others, (2006) e KLR** :

- “1. the proceedings in question were purely public-law proceedings and are to be considered entirely free of any private-business arrangements or earnings of the tea production sector;**
- 2. the taxation of advocates’ instruction fees is to seek no more and no less than reasonable compensation for professional work done;**
- 3. the taxation of advocates’ instruction fees should avoid any prospect of unjust enrichment, for any particular party or parties;**
- 4. so far as apposite, comparability should be applied in the assessment of advocate’s instruction fees;**
- 5. objectivity is to be sought, when applying loose-textures criteria in the taxation of costs;**
- 6. where complexity of proceedings is a relevant factor, firstly, the specific elements of the same are to be judged on the basis of the express or implied recognition and mode of treatment by the trial judge;**
- 7. where responsibility borne by advocates is taken into account, its nature is to be specified;**
- 8. where novelty is taken into account, its nature is to be clarified;**
- 9. where account is taken of time spent, research done, skill deployed by counsel, the pertinent details are to be set out in summarised form.”**

15. These guidelines were also applied by Odunga J. in **Nyangito & Co Advocates – Vs - Doinyo Lessos Creameries Ltd [2014] eKLR**, and the learned Judge in addition also held that the taxing officer must first recognize the basic instructions fee payable before venturing to consider whether to reduce or increase it.

16. In the present application, the applicable law on the taxation of the Respondents’ Party and Party Bill of Costs dated 17th November 2017 is Schedule 11A of the Advocates (Remuneration) Order 2014, which provides for party and party costs of proceedings before tribunals other than the tribunals under the Landlord and Tenant (Shops, Hotels And Catering Establishments) Act and Rent Restriction Act. The following principles of taxing of such party and party costs are provided in paragraphs 1 to 9 of the Schedule:

- a. When taxing the costs consideration shall be given by the taxing officer to either the value of the subject-matter or, where the value of the subject matter cannot be determined, to the following criteria.
 - i. the nature and importance of the proceedings;
 - ii. the complexity of the matter and the difficulty or novelty of the question raised;
 - iii. the amount or value of the subject matter,
 - iv. the time expended by the advocate(s) ,
 - v. The number and importance of the documents prepared or perused, without regard to length
- b. Costs exceeding the scale provided in the schedule which applies in cases where the value of the subject matter can be ascertained may be allowed for special grounds arising out of the nature and importance or the difficulty or the urgency of the case.
- c. Except for good reason to be recorded, costs shall be awarded to the party who substantially succeeds upon the reference or other proceedings.
- d. The “Lower Scale” as provided in the schedule shall be applied where the matter is disposed of ex parte, by consent or by a decision on a preliminary question of law not dependant on fact and the “Higher Scale” shall be applied in all other cases.
- e. Where the value of the subject matter cannot be ascertained such costs as the court in its discretion but not less than Kshs. 35,280 if undefended or unopposed and (subject to any special order for good reason connected with the nature and importance or the difficulty or the urgency of the matter) such figure being left to the discretion of the court.

f. The instruction fee shall include taking instructions, drawing, perusals, engrossing documents and filing the same.

17. When taxing the Bill of Costs in the present applications, the Taxing Officer in the ruling dated 24th May 2018 did correctly apply Schedule 11A, and noted that the subject matter therein was not certain. The Taxing Officer also considered the principles as regards taxation of costs outlined in **Republic vs. Ministry of Agriculture & 2 Others Ex parte Muchiri W’Njuguna & 6 Others, (supra)** and **Joreth Ltd vs Kigano & Associates (supra)**, as well as the provisions of paragraph 9 of Schedule 11A which provides for a minimum instruction fee of Kshs 35, 280/=.

18. In addition, after perusing the relevant Court file, the Taxing Officer ruled that she had considered the importance of the matter to the parties, the documents prepared or perused, the period of time the matter was in Court and the amount of research done in the matter. She also noted that the matter was not classified as complex or novel in the judgment given by the PPDT, and in light of all these considerations taxed item 3 on instruction fees as Kshs 622, 646/=. I also note from the ruling that a considerable number of items were taxed off completely from the Bill of Costs, as being taken care of in the instruction fees.

19. I therefore find that the taxing master did take into account relevant considerations and gave reasons why she exercised her discretion to tax off the item on professional fees from Kshs 5,000,000/= to Kshs 622,646/=. Further, the instruction fee awarded was not excessive in the circumstances. I have in this regard noted that the application the Respondents filed in the PPDT on 13th May 2017 included various annexures, as did the replying affidavit thereto filed by the Applicant on 18th May 2017; and was prosecuted between the date of filing on 13th May 2018 and dated of delivery of the ruling by the PPDT on 25th July 2017.

20. The said application also involved nomination of five candidates to vie for political office. The proceedings were therefore not only urgent and time consuming, but also important to the Respondents as they were affecting their political careers, and the Taxing Officer therefore did not err in her findings.

The above observations by this Court also lend credence to the averments by the Respondent that the matter necessitated numerous attendances at the registry and court, and the Respondents are therefore entitled to costs for attendances at the registry, court and service upon the parties. It is also notable that the taxing officer in her ruling taxed off these items to scale.

21. In the premises I find that the decision of the taxing master in awarding instruction fees of Kshs 622, 646/= and the costs for attendances at the registry, effecting service upon the parties and attending court was not based on any error of principle, neither were the said cost as awarded excessive to justify interference by this Court.

22. The findings of this Court to a large extent render the second issue of stay of execution moot, as the Applicant sought the orders of stay of execution pending the hearing of the its reference, which this Court finds not to have merit for the reasons given in the foregoing. In addition, the decision whether to grant stay or not is a discretion of the court and the Applicant did not bring any evidence to show the substantial loss that it may suffer if stay is not granted, and on the contrary is willing to settle the taxed costs.

23. I accordingly dismiss the Chamber Summons dated 20th June 2018 and the Notice of Motion dated 24th June 2018 with costs to the Respondents.

24. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 11TH DAY OF OCTOBER 2018

P. NYAMWEYA

JUDGE